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THE STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

REGENESIS CORPORATION)	05- 11 WMC
1994 Maple Street)	WMC NO. _____
West Hopkinton, NH 03229)	
)	APPEAL OF LICENSE
)	REVOCATION
Re: Solid Waste Permit No. DES-SW-SP-002)	DES DOCKET NO. 04-010
Bio Energy Solid Waste Facility)	
West Hopkinton)	
)	
)	

PETITION TO INTERVENE
BY CITIZENS FOR A FUTURE NEW HAMPSHIRE

Citizens for a Future New Hampshire ("CFNH"), by its Attorneys, Anderson & Kreiger, LLP, files this petition for intervention, pursuant to RSA 541-A:32 and Env-WMC 204.05(a), seeking express authorization to file and pursue the "Notice of Appeal by Citizens for a Future New Hampshire," filed simultaneously herewith, and also to participate in any appeal(s) initiated by Regenesis Corporation ("Regenesis") or any other person relating to the "Decision on Proposed Revocation of Solid Waste Permit," issued by Presiding Officer Michael J. Walls of the New Hampshire Department of Environmental Services ("DES") on June 23, 2005 (the "Permit Decision" (Exhibit A to CFNH's Notice of Appeal). As discussed below, CFNH believes it has standing to file and pursue its appeal and to participate as a party in any appeals filed by others and, therefore, that the filing of this petition is not necessary. However, CFNH files this petition if and to the extent necessary, all rights reserved.

I. CFNH Has Standing to Appeal the Permit Decision in its own Right and Otherwise Is Not Required to Intervene.

"Administrative appeals from decisions of the department made under the provisions of

this chapter shall be heard by the waste management council under RSA 21-O:9, V.” RSA 149-M:8. Env-WMC 204.02(b)(5) provides that any person filing a notice of appeal¹ must give “[a] clear and concise statement as to ... why the appellant will suffer a direct and adverse affect as a result of the decision being appealed in a way that is more than any impact of the decision on the general public.”

CFNH is a non-profit corporation dedicated to protection of the environment of New Hampshire and the public health of New Hampshire citizens. Its corporate address is 580 Brockway Road, Hopkinton, New Hampshire 03229. CFNH has approximately 25 members, including many Hopkinton residents living in close proximity to the Bio Energy/Regenesis solid waste facility at 1994 Maple Street, Hopkinton (“the Facility”) – some owning property abutting the Facility or abutting the adjacent properties owned by corporate affiliates of the Facility’s owners/operators.

CFNH’s members – and, in particular, those that live in close proximity to the Facility – will suffer direct and adverse effects as a result of Presiding Officer Walls’ Permit Decision in a way that is more than any impact of the decision on the general public, because

(1) In the Permit Decision, Presiding Officer Walls properly revoked the Permit on certain

grounds, but erroneously failed to revoke on a more serious ground – i.e. Regenesis’ lack of

¹ The WMC Rules define the “parties” to appeals of (1) an administrative order; (2) the denial of a permit application; and (3) the issuance of a permit. Env-WMC 204.06. The Rules do not expressly cover appeals from permit revocation decisions, although this type of final agency action is clearly within the purview of “department decisions” contemplated by RSA c. 21-O:14, I. The Permit Decision at issue here also confirms that “any appeal of this decision shall be filed with the Waste Management Council.” See Decision on Proposed Revocation of Solid Waste Permit, NPLA No. 40-010, p. 92 (June 23, 2005) (copy attached as Exhibit A to CFNH’s Notice of Appeal, filed simultaneously herewith).

In addition, the Rules state that “[t]he parties to an appeal of the *issuance* of a permit shall be: (1) The person who filed the appeal; (2) The department; (3) The permit holder, if not the appellant; and (4) Any person allowed by the council to intervene.” Env-WMC 204.06(c) (emphasis added). Clearly, then, the rules contemplate that the appellant may be someone other than the department, permit holder or persons allowed to intervene by the WMC.

reliability and integrity. This leaves open the possibility of Regenesis officials' reapplying for a solid waste permit and potentially operating Facility.

- (2) If this Facility becomes operational, it would be the largest single emitter of lead into the air in New Hampshire. Even if the Facility were operated in full compliance with the law (and even more so if it were not), CFNH members – due to their proximity to the Facility – would be disproportionately impacted by, among other things, the air pollution, noise and traffic associated with the Facility operations.
- (3) Presiding Officer Walls also erred in concluding that Bio Energy and/or Regenesis provided proper notice to the public pursuant to Env-Wm 303.05(d) in connection with their solid waste permit applications when they sent notices to their corporate affiliates and not to abutters to those affiliates. To the extent this conclusion may have any preclusive effect in the future, it will deprive some CFNH members of a valuable and statutorily mandated mechanism for being informed of licensing-related activities at the Bio Energy Facility.
- (4) CFNH has a lawsuit pending entitled CFNH v. Bio Energy, LLC et al., Merrimack Superior Court No. 04-EO-387 (“CFNH Lawsuit”), which involves significantly overlapping facts and issues as those addressed by the Permit Decision. Accordingly, the Permit Decision and any appeal from that decision may substantially affect CFNH’s claims and interests in the CFNH Lawsuit.
- (5) CFNH was allowed to intervene in the administrative proceedings related to the Permit Decision² and actively participated in those proceedings. See New Hampshire Practice, Vol. 4, pp. 132-133, § 6.23 (1997) (“Once a person has been allowed to intervene, as a party, he has all the rights of a party in the case as it then exists and thereafter develops (emphasis

² See Order on Motions to Intervene (December 22, 2004), attached as Exhibit A hereto.

added) (citing In re Petition for Admission of Demers, 130 NH 31 (1987) (the Superintendent of the State Hospital petitioned to intervene in an involuntary commitment proceeding after the entry of an order of commitment imposing special conditions on him; the Supreme Court recognized that the Superintendent became a party to the proceeding after being allowed to intervene and was thereby authorized to pursue a direct appeal of the order and of the court's refusal to reconsider it)).

- (6) Regenesis previously stipulated to CFNH's standing in this matter.³
- (7) As a person or persons aggrieved, CFNH would have a clear statutory right to appeal any decisions of the Waste Management Council. See RSA c. 21-O:14, III ("Persons aggrieved by the disposition of administrative appeals before any council established by this chapter, ... may appeal such results in accordance with RSA 541."); see also Appeal of the Londonderry Neighborhood Coalition, 145 N.S. 201, 202 (2000) (Nonprofit corporation comprised of local residents that "was granted limited intervenor status by" the Energy Facility Site Evaluation Committee and was allowed to actively participate in the hearings before the Committee had standing to pursue an appeal to the New Hampshire Supreme Court pursuant to RSA 541:3). It would be nonsensical for CFNH to have standing in the administrative proceedings underlying the Permit Decision and also to appeal from a decision by the WMC, but to not have standing to appeal to the WMC or participate in appeals filed by others with the WMC.

³ See Hearing Transcript, pp. 198-199 (April 18, 2005), excerpts attached as Exhibit B hereto.

II. CFNH Petitions to Intervene, If and To the Extent Necessary

If and to the extent necessary, all rights reserved, CFNH hereby petitions to intervene pursuant to RSA 541-A:32 and Env-WMC 204.05, seeking express authorization (1) to file and pursue its appeal to the WMC and (2) to participate in any other appeal(s) initiated by Regenesys or any other person relating to the Permit Decision or underlying proceedings. In support of this petition, CFNH incorporates the arguments above. It also states as follow:

(1) CFNH has a right to intervene pursuant to RSA 541-A:32, I (“The presiding officer

“shall” grant one or more petitions to intervene if), because:

- a. CFNH files this petition before a hearing date has been set, in compliance with RSA 541-A:32, I(a), which requires intervention petitions to be filed at least three days before the hearing;
- b. The rights, duties, privileges, immunities and other substantial interests of CFNH and its members may be affected by these proceedings in numerous ways, within the meaning of RSA 541-A:32, I(b), as discussed above and in CFNH’s Notice of Appeal; and
- c. CFNH’s intervention would promote – and certainly not impair – the interests of justice and the prompt and orderly conduct of proceedings in accordance with RSA 541-A:32, I(c).⁴

(2) Alternatively, CFNH should be permitted to intervene pursuant to RSA 541-A:32, II, because doing so will serve the interests of justice and the prompt and orderly conduct of the proceedings.

⁴ CFNH was permitted to intervene in the underlying proceedings, actively participated in those proceedings, and submitted briefs and legal arguments, supported by authority, regarding the relevant legal issues and standards. It would be unjust and inefficient to conduct an appeal of this decision without CFNH, as it has been a key figure in the proceedings thus far.

CONCLUSION

For the above reasons, CFNH believes that it has a statutory right to file and pursue its appeal of the Permit Decision (and associated rulings) to the WMC and to otherwise participate in any appeals filed by others.

However, if and to the extent necessary (all rights reserved), CFNH requests that the WMC allow it to intervene under RSA 541-A:32, I or II and authorize it to pursue its appeal (filed simultaneously herewith) and to participate in any appeal(s) initiated by Regenesis or any other person relating to the Permit Decision.

Respectfully submitted,

CFNH,
By its attorneys

COPY

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Date: July 25, 2005

CERTIFICATION

I hereby certify that a copy of the foregoing has on this 25th day of July, 2005 been forwarded, via first class mail, postage prepaid, to:

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COPY

A

Regencsis Corporation
1994 Maple Street
West Hopkinton, NH 03229

Re: Solid Waste Permit No. DES-SW-SP-002
Bio Energy Solid Waste Facility
West Hopkinton

NOTICE OF PROPOSED
LICENSE ACTION
No. 04-010

December 22, 2004

ORDER ON MOTIONS TO INTERVENE

The above-captioned license proceeding is scheduled for a hearing on the merits on January 7, 2005. Motions to Intervene have been filed by the Town of Hopkinton, Resident's Environmental Action Committee for Health ("REACH") and by the Citizens for a Future New Hampshire ("CFNH"). No objections have been filed to the Motions to Intervene by the parties to the proceeding, the Department of Environmental Services and Regencsis Corporation.

All three Motions to Intervene are granted. The Town of Hopkinton has a statutory right to participate in the proceeding as the host community for the Regencsis facility. RSA 541-A:39. As described in their Motions to Intervene, REACH and CFNH are non-profit corporations who represent persons allegedly affected by the operation of the Regencsis facility in Hopkinton. Neither REACH nor CFNH has standing to participate in this proceeding as a matter of right, because the interests they assert are essentially the interests of the public in general. See Appeal of Richards, 134 N.H. 148 (1991). No rights, duties, privileges, immunities, or other substantial legal interests of REACH or CFNH will be directly affected by the outcome of the Regencsis license proceeding. However, the Motions filed by REACH and CFNH describe active participation by both groups in the legal and regulatory issues surrounding the Regencsis facility. Intervention by REACH and CFNH will further the interests of justice by allowing non-governmental community representatives to participate in the proceeding. Both REACH and CFNH are represented by counsel who have demonstrated familiarity with the Administrative Procedure Act, RSA 541-A, and the procedural rules of the Department of Environmental Services, Env-C Chapter 200. Thus, intervention by REACH and CFNH is not likely to impair the orderly and prompt conduct of the proceedings. Intervention is appropriate under RSA 541-A:32, II.

Copies of the Assented-to Motion to Reschedule Prehearing Conference and the Department's letter rescheduling the prehearing conference to January 4, 2005, are attached to this order.

Department of Environmental Services

By: 
Michael J. Walls, Presiding Officer

cc: Jennifer J. Patterson, Senior Assistant Attorney General
Edward A. Haffer, Esquire

B

STATE OF NEW HAMPSHIRE

 Regenesia Corporation
 1994 Maple Street
 West Hopkinton, NH 03229

Re:
 SOLID WASTE PERMIT NO. DES-SW-SP-002
 BIO ENERGY SOLID WASTE FACILITY
 West Hopkinton

Hearing held at N.H. Department of Environmental
 Services, 29 Hazen Drive, Concord, New Hampshire,
 on Tuesday, April 19, 2005, commencing at 9:30 a.m.

HEARING OFFICER:
 Michael J. Walls, Esq.
 Department of Environmental Services
 Assistant Commissioner

Also present:
 Michael Sciafani, Esq.
 Legal Assistant, Appeals Clerk

Court Reporter:
 Pamela Carle, CCR, RPR
 New Hampshire CCR No. 109 (RSA 331-B)

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APPEARANCES

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 And
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 By: John E. Friberg, Jr., Esq.

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CHAIRMAN WALLS: Well, we're back for

day 2 in the hearing for the Regenesia matter. As
 I recall, we left off with Mr. Smith on the witness
 stand, and he was about to be cross-examined by
 Attorney Roelofs.

So, Mr. Smith. Let me just remind you
 that you're still under oath.

THE WITNESS: Okay.

(Harry Smith, previously sworn)

EXAMINATION

BY MR. ROELOFS:

Q. Good morning, Mr. Smith. Jeff Roelofs
 with CFNH.

A. Good morning.

Q. I'd like to hand you a few exhibits
 that I'll be getting to in my line of questions.
 There will be some additional exhibits that I'll
 refer to that you'll find in the binder here. I'll
 give you the exhibit number and identify which of
 the volumes contain which exhibit numbers to help
 you find them amongst the pile.

A. Okay.

Q. I'd first like to draw your attention

1 **modifications that are needed at the facility**
2 **are -- are completed.**

3 Q. How about governmental approvals with
4 respect to any permits?

5 A. **All the permits need to be transferred**
6 **to Regenesis.**

7 Q. All right. But I believe you testified
8 previously that the permit shield concept is -- is
9 standing in the way of a transfer at this point?

10 A. **That's correct.**

11 Q. And what will remove that impediment?

12 A. **The issuance of the renewals.**

13 Q. And this is true in the air context, is
14 that right?

15 A. **That's correct.**

16 Q. And is it true in the water discharge
17 context?

18 A. **That's correct.**

19 Q. And once those two permits are issued
20 by the government, then what will happen?

21 A. **Then those permits will be transferred**
22 **to Regenesis.**

23 MR. HAFFER: I have no further

1 questions at this time, Mr. Chairman.

2 CHAIRMAN WALLS: I hesitate to look to
3 the back row, but, Attorney Roelofs, do you have
4 any more questions?

5 MR. ROELOFS: I do not have anymore
6 questions, but I do want to inform you on the
7 record, with respect to the abutter notification
8 issue, you may have noticed that we did not inquire
9 as to these issues. And the reason is I have been
10 working with respondent's counsel on a stipulation
11 intended to boil that issue down to a legal one.

12 We have a draft stipulation that we
13 have all agreed to. We haven't yet printed it and
14 signed it, but they have represented that we are in
15 agreement. We expect to be filing that tomorrow
16 with respect to the facts.

17 They have also represented -- and I
18 would like them to confirm this -- that they will
19 not be challenging the standing of CFNH to press
20 the notice issue. That will allow me not to have
21 to bring in a CFNH member to confirm that he or she
22 owns one of the properties that abuts the property
23 that did receive notice.

1 MR. HAFFER: Mr. Chairman, we agree
2 that with respect to this proceeding that we're in
3 right now that we are not challenging the CFNH
4 standing issue. We reserve all rights in other
5 proceedings.

6 MR. ROELOFS: And that's understood
7 from our end.

8 CHAIRMAN WALLS: I appreciate that v
9 much, and I will look forward to receiving the
10 stipulation.

11 The town, or REACH?

12 MR. LAJOIE: No questions.

13 CHAIRMAN WALLS: It appears, Mr. Sm
14 that you are excused. Thank you.

15 Attorney Patterson, do you have another
16 witness?

17 MS. PATTERSON: I do. The state calls
18 Trey Dykstra.

19 (Trey Dykstra, sworn)

20 EXAMINATION

21 BY MS. PATTERSON:

22 Q. Could you please state your name and
23 spell both your first and last name for the record?

1 A. **Yes. It's Trey Dykstra. T-R-E-Y,**
2 **D-Y-K-S-T-R-A.**

3 Q. And what is your business address?

4 A. **29 Hazen Drive.**

5 Q. And where do you work?

6 A. **At the New Hampshire Department of**
7 **Environmental Services.**

8 Q. What exactly is your job here?

9 A. **I'm a civil engineer, and I review**
10 **permit applications.**

11 Q. Within which program do you work?

12 A. **Within the Solid Waste Management**
13 **Bureau, which falls in the Waste Management**
14 **Division.**

15 Q. And how long have you been in that
16 position?

17 A. **Approximately two-and-a-half years.**

18 Q. So when did you start?

19 A. **It was about September 1st, 2002.**

20 Q. And what education or experience do you
21 have that qualifies you for that position?

22 A. **I have a bachelor of science degree in**
23 **civil engineering, and a master's degree in civil**